

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 2624 OF 2006

MUKESH J. GURNANI & ANR. PETITIONERS

Versus

THE SARASWAT CO-OP. BANK LTD. & ORS. RESPONDENTS

Mr. R.S. Deshpande with B.G. Tangsali for
petitioners

Mr. Prasad Borkar for R-1

Ms. M.M. Deshmukh, APP

CORAM:-SMT. RANJANA DESAI, J.

DATED:- 13/12/2006

P.C.

. The petitioners are the accused in C.C. No. 4005/SS/2005 pending on the file of Metropolitan Magistrate, 13th Court at Dadar, Mumbai. The complaint is filed by The Saraswat Co-operative Bank Ltd., the 1st respondent herein under Section 138 of the Negotiable Instruments Act, 1881 ("the said Act" for short).

2. In this case an application was preferred by the petitioners for recall of PW 1 under Section

311 of the Criminal Procedure Code ("Code" for short). The said application was rejected by the learned Magistrate on 2/11/06. Being aggrieved by this order the petitioners preferred revision application in the Sessions Court at Mumbai. That was rejected on 24/11/06 and hence this petition.

3. I have heard Mr. Deshpande, the learned counsel appearing for the petitioners at great length. Mr. Deshpande contended that the 1st respondent had advanced loan to one Kishore Gurnani. The amount due and payable by the said Kishore Gurnani to the 1st respondent is to the tune of Rs.12,77,523/-. Three persons stood guarantors of Mr. Gurnani for the said transaction. The petitioners are not the guarantors. They have not executed any documents in connection with the loan advanced to the said Kishore Gurnani. It is the case of the petitioners that on 4/10/05 Special Recovery Officer of the Bank visited Mr. Kishore Gurnani's house. The petitioners who are nephews of Kishore Gurnani were present there. Recovery officer made the petitioners sign the letter giving undertaking that they would pay the outstanding dues of Kishore Gurnani to the bank. They forced the petitioners

to give a cheque in the sum of Rs.5 lakhs drawn in favour of the 1st respondent. Needless to say that this case is being disputed by the 1st respondent bank. When these cheques were presented for encashment they bounced.

4. Mr. Deshpande drew my attention to the evidence of PW 1. He submitted that PW 1 has stated in his evidence that Mr. Kishore Gurnani had applied for loan. He has admitted that the petitioners had not applied for loan. Mr. Deshpande contended that inadvertantly PW 1 was not cross-examined by the counsel for the petitioners on the question whether there was any privity of contract between the 1st respondent and the petitioners and, therefore, for that purpose application was made that PW 1 be recalled. He submitted that in the interest of justice the learned Magistrate should have granted this application. In support of his submissions, the learned counsel relied on the judgment of the Supreme Court in **Rajendra Prasad v. Narcotic Cell through its officer-in-charge, Delhi, AIR 1999 SC 2292.**

5. I have heard Mr. Borkar, learned counsel for

respondent 1. He strenuously contended that this is one more attempt to procrastinate the litigation. He has drawn my attention to the affidavit of Mr. Ravindra Pandurang Karekar, Officer of the bank in which Mr. Karekar has set out the manner in which according to him the case is being delayed.

6. I have carefully perused the affidavit of Mr. Karekar. The affidavit undoubtedly indicates that time and again matter is being adjourned at the instance of the petitioners. It is necessary to note the contents of this affidavit. As per this affidavit, Mr. Karekar was cross-examined on 5/9/06. The case was kept for statement of the accused i.e. the petitioners under Section 313 of the Code on 18/9/06. It was adjourned to 26/9/06. On that day petitioner 2 was absent. Hence non-bailable warrant was issued against him. On the same day on behalf of the petitioners application was made for recalling PW 1. The case was adjourned to 12/10/06 for filing reply. On 12/10/06, the bank filed its reply. Arguments were heard and the matter was adjourned to 2/11/06 for orders. On 7/10/06 the non-bailable warrant issued against the 2nd petitioner was cancelled. On

2/11/06 the petitioners' application was rejected and their statement under Section 313 of the Code was recorded. Petitioner 2 expressed desire to examine himself on oath as defence witness. The same was allowed. After recording statement of the petitioners the case was adjourned for defence witness on 9/11/06. On 8/11/06 the petitioners filed revision application before the Sessions Court. Further proceedings were stayed by the Sessions Court till 13/11/06. Hence the learned Magistrate adjourned the case till 20//11/06. Copy of the revision application was not served on the bank till 13/11/06. It was served only on 13/11/06 at 1-45 p.m. Hence the banks representative could not remain present in the court on 13/11/06. On 24/11/06, the learned Sessions Judge dismissed the criminal revision application and directed the petitioners to appear before the trial court on 28//11/06. On 28/11/86 defence witness was to be examined. However, the petitioners sought adjournment by making a false statement that talks of settlement were going on when in fact no such talks were going on. As a last chance case was adjourned to 30/11/06, to enable the petitioners to examine defence witness at 2-45 p.m. On 30//11/06, the petitioners applied for adjournment on the

ground that their advocate was unwell when in fact the petitioners' advocate was in Dadar Court on that day. As the petitioners were not ready to examine defence witness the learned Magistrate closed the evidence of the petitioners and kept the matter for final arguments on 8/12/06. This affidavit undoubtedly establishes that the petitioners are purposely delaying the trial. Their prayer for recall of PW 1 is not bonafide. In any event, I feel that both the courts have rightly rejected it.

7. It is true that in **Rajendra Prasad's case (supra)** the Supreme Court has observed that whenever courts exercise powers under Section 311 of the Code, objection is raised that it is an attempt to fill the lacuna in the prosecution case. The Supreme Court has clarified that a lacuna in the prosecution is not to be equated with the fall-out of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The Supreme Court has further clarified that the laches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up. I may also

quote paragraph 7 on which heavy reliance is placed by Mr. Deshpande;

. "Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

8. There can be no doubt that Section 311 vests wide discretion in criminal court. In the interest of justice at any stage of trial the court can recall a witness. This power has to be exercised/used with care and circumspection. It is

true as stated by the Supreme Court that all errors committed by counsel cannot be termed as lacuna in prosecution case and in the interest of justice in certain cases permission also must be given to correct errors but not inherent weakness of the prosecution case. But the Supreme Court has not stated that persons who try to procrastinate the litigation by filing such applications should be encouraged.

9. In this case, in my opinion, the above observations of the Supreme Court are not attracted. As I have already stated that the affidavit of Mr. Karekar makes it evident that there is an attempt to delay the trial. Both the courts have rightly held that it is always open to the petitioners to lead defence evidence to rebut the evidence of prosecution witnesses. In fact that application made by the petitioners was granted and the matter was adjourned. It is the petitioners who did not examine defence witness. The only ground which the petitioners have raised for recalling PW 1 is that some questions as regards privity of contract have to be asked to PW 1. PW 1 has been sufficiently cross-examined by the petitioners. They could have very well adduced

defence evidence to establish their case. Their conduct indicates that application filed by them is not bonafide.

10. In view of this no interference is necessary with the impugned order. Petition is rejected.

JUDGE.